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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 868

UNITED TRANSPORTS, INC., CLARK TRANSPORT COMPANY, AND AUTO CONVOY CO., *Appellants*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

On Appeal From the United States District Court For the Western District of Oklahoma

MOTION TO AFFIRM

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Dated: January 28, 1966

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION TO AFFIRM

Comes now Kenosha Auto Transport Corporation (Kenosha), appellee in intervention, and respectfully files its motion to affirm pursuant to Rule 16(1)(c) of the Rules of this Court.

I

Appellees, the United States and the Interstate Commerce Commission, have properly set forth in their motion the background of this proceeding as well as this Court's rulings, *per curiam,* in two prior cases involving the same legal issues as here, i.e., *Motor Convoy, Inc.* v. *United States,* 235 F. Supp. 250, affirmed 381 U.S. 436; and *Convoy Company* v. *United States,* D. Ore., unreported, affirmed *per curiam,* No. 719, ... U.S.L. Week ....., (U.S. January 17, 1966).

II

Appellants obviously are seeking to divert traffic (International Harvester Company trucks) to their lines or at least delay the modification of Kenosha's certificates as long as possible, apparently expecting to continue to enjoy "windfall" traffic during the lengthy administrative process. They would have the Court treat Kenosha's petition for modification as an application for new authority, notwithstanding that Kenosha's original applications, filed years ago, were subjected to the hearing process and a public need for Kenosha's service in the transportation of International Harvester trucks was *then* established.[1]

Appellants would have Kenosha establish again a public need for its service in the transportation of International Harvester trucks; this time from the destination railheads rather than from the manufactur-

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[1] It should be noted that, in accordance with the decision in *National Automobile Transporters Assn. Petition For Declaratory Order,* 91 M.C.C. 395, 415 (N.A.T.A.), Kenosha filed its petition for modification in the same dockets in which its initial authorities had been granted.

ing or producing plants. Meanwhile, appellants would be transporting the traffic under operating rights which were issued with *other than* the instant traffic in mind. Attached to Kenosha's petition for modification is an affidavit from an official of International Harvester, attesting to the fact that it has utilized the services of Kenosha for over thirty years, that it was now shipping its vehicular traffic by rail, and that it desired to utilize Kenosha's service in the future from the destination railheads. Appellants did not, and could not, dispute any of these averments.

III

Kenosha is not seeking "to dilute" any other carrier's traffic; it is merely trying to retain that traffic which it handled for years. That is why it filed the Motion To Vacate the Temporary Restraining Order, which apparently has been ignored, as well as its Opposition To The Motion For Stay, both of which are part of the record on appeal.

The Commission's procedure, established in *N.A.T.A., supra,* relative to the modification of existing certificates of the over-the-road carriers of automobiles and trucks, is a reasonable exercise of administrative discretion and expertise. The procedure should not be disturbed at the behest of carriers hoping to gain at the expense of the initial or long-haul automobile transporters. The Commission's decision in *N.A.T.A.* is a presently effective decision of the entire Commission. It was not reversed or overruled by any other decision of the Commission. Appellants are grasping at technicalities in their quest to inherit all post-rail automobile and truck traffic. The applicable law as well as the equities are in favor of the appellees.

Conclusion

It is respectfully submitted that the questions presented lack substantiality. The issues have been decided by this Court in *Motor Convoy* and in *Convoy, supra.* The judgment of the district court should be affirmed.

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Certificate of Service

I hereby certify that I have, on this 28th day of January 1966, served a copy of the foregoing motion to affirm by first-class mail upon all counsel of record.

PAUL F. SULLIVAN